IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2009 Session

# STATE OF TENNESSEE v. BRIAN MILAM

**Appeal from the Circuit Court for Wayne County**
**No. 11,016 Jim T. Hamilton, Judge**

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**No. M2008-00695-CCA-R3-CD - Filed March 3, 2010**

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Appellant, Bryan Milam, was indicted by the Wayne County Grand Jury for two counts of first degree premeditated murder resulting from the shooting death of his pregnant wife. After successfully appealing his initial conviction for both counts, Appellant was retried and convicted of one count of first degree murder and one count of second degree murder. Appellant was sentenced to life for first degree murder and twenty-three years for second degree murder to be served consecutively. Appellant appeals both convictions. He argues that: (1) the evidence is insufficient to support his convictions; (2) the trial court erred in allowing a State's witness to testify on redirect examination about another witness's statement; (3) the trial court erred in allowing Juror Billy Hill to continue deliberations with the jury; (4) the trial erred in enhancing Appellant's sentence based upon enhancement factors that violate *Blakely v. Washington*, 542 U.S. 296 (2004); and (5) the trial court was vindictive in imposing consecutive sentences. After a thorough review of the record, we conclude that the evidence is sufficient to support his convictions for both first degree and second degree murder; the trial court properly allowed the State's witness to testify regarding the statement based upon curative admissibility; the trial court properly allowed Juror Hill to continue to deliberate because there was no violation of Appellant's right to trial by jury; the trial court's application of enhancement factors does not violate *Blakely*; and the trial court's imposition of consecutive sentences was not judicial vindictiveness and is supported by the record. Therefore, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Brian Milam

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Mike Bottoms, District Attorney General, and J. Douglas Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The Wayne County Grand Jury indicted Appellant for two counts of first degree premeditated murder. Appellant was found guilty of both counts and sentenced to life imprisonment for each count. *State v. Bryan A. Milam*, No. 01C01-9712-CC-00557, 1999 WL 701419, at *1 (Tenn. Crim. App., at Nashville, Sept. 10, 1999). Appellant appealed his convictions, and this Court reversed the convictions based upon an improper jury instruction. *Id.* We remanded for a new trial. The trial court held a new trial on June 27-29, 2000. The following evidence was presented at the second trial.

On May 12th or 13th 1996, Appellant and Ernest Moyer were canoeing on the Buffalo River. When they returned to Appellant's house, Mr. Moyer overheard Appellant and the victim arguing about a charge account at a store. Mr. Moyer saw Appellant pull a gun out and say that "he'd put a hole through her and that goddamn baby." Mr. Moyer saw Appellant follow the victim down the hall towards the bedrooms with his gun in his hand. Mr. Moyer grabbed the two children who were in the house and took them out onto the front porch. Mr. Moyer did not see Appellant shoot or hit his wife that day.

On May 15, 1996, Heather Olive was visiting Jason and April Griggs who lived two houses down from Appellant and the victim. Ms. Olive and Mrs. Griggs both testified to the following facts. Ms. Olive and the Griggses were visiting outside in the driveway. They saw Appellant arrive home. He drove up into the yard and went inside his house. They heard a shot and saw children running and screaming out of the victim's house. The children ran across the street to a neighbor's house. Appellant came out of the house, went to the car, got something out of the car, ran around to the back of the house, and went back into the house. He was in a hurry but was not hysterical. Ms. Olive and the Griggses heard another shot. Appellant came back out of the house, ran around the house, and went back in again. When Appellant ran around the house, Ms. Olive positioned herself so she could watch him. She saw Appellant throw something into the woods. Appellant was not hysterical. Shortly thereafter, Appellant came out of the house pulling the victim's body. Appellant was hysterical and repeating, "Why did you do this, baby? Don't leave me, baby." When Police Chief Gene Seitz arrived on the scene, Ms. Olive told him that she saw Appellant throw something in the woods.

Ms. Pam Askins also lived in the neighborhood. On the evening in question, she was getting ready to take her baby for a walk in the stroller. She saw the Griggses outside their house. She heard a gunshot and saw the children run out of the house. Ms. Askins heard another gunshot and saw Appellant run out of the house and go to his car. She returned home and called Appellant's grandmother to tell her that there had been an accident at the house and see if she wanted to go to the hospital. Ms. Askins picked Appellant's grandmother up in the car and took her to the hospital. At the hospital, Appellant told Ms. Askins that the victim had shot herself and indicated that she had shot herself under the chin.

Jay McWilliams and his wife Sharon lived directly across the street from Appellant and the victim. On the evening of May 15, 1996, he was standing in his carport. While he was there, he heard a gunshot inside the house across the street. Then he saw three children come across the street to his house. The oldest, Falen, was saying, "My brother is going to shoot hisself [sic]" and "Call 911, Call 911. My brother has shot his wife." Edith Dickson was staying with Sharon and Jay McWilliams, her daughter and son-in-law. She was washing dishes when a boy arrived at the kitchen door who was crying and yelling "Call 911." A girl with him said, "My brother has shot his wife." Another child said, "Daddy had shot his wife and blood was running out on the pillow." Another child said, "Oh, my mama has got a baby in her belly and my baby is dead." Ms. Dickson stopped washing the dishes when the children came into the house. She heard a gunshot. Mrs. McWilliams was at the carport door when she heard a gunshot and called 911 after hearing the gunshot. Mr McWilliams went back outside and saw Appellant carrying the victim out of the house when Chief Seitz arrived. Chief Seitz told Appellant to put his wife down on the ground. Mr. McWilliams heard Appellant tell Chief Seitz to call an ambulance. The McWilliams family kept the children in the living room and tried to calm them down.

Chief Seitz of Waynesboro was at home on May 15, 1996. He heard a call on his police scanner about shots being fired. Chief Seitz called the dispatcher and discovered that the shots were being fired at the Milam residence. He told the dispatcher he was on his way. When he arrived, he noticed a group of adults and children in the yard across the street from the Milam residence. He walked toward the door, and Appellant came running out of the door. Appellant was crying and hysterical. He also was covered with blood. Appellant said "Help me. My wife's been shot." Chief Seitz entered the home and found the victim, who was Appellant's wife, on the couch with her head slumped over her chest. Chief Seitz walked over to her and noticed a gun laying on the couch to her right and blood everywhere. Chief Seitz opined at trial that there was no way that the victim could have reached the gun from her position on the couch. At the scene, he saw that the victim had a bullet hole below her scalp in the center of her forehead. Later at the hospital, he discovered that there was an exit wound at the base of her skull below the hairline.

He told Appellant that he was going to call for help and went outside to his patrol car. When Chief Seitz turned to get out of the car, Sergeant Chris Ray was arriving, and Appellant was coming through the front door carrying the victim. Chief Seitz forced Appellant to the ground with the victim, and the ambulance arrived at that time. Chief Seitz noticed that the victim's body was lifeless. While emergency personnel began to work on the victim, Chief Seitz and Sergeant Ray went to look for any other individuals in the house. They did not perform a crime scene investigation. Immediately after the ambulance arrived, Appellant ran and got into a car, jumped a ditch with the car, and left before the ambulance. Chief Seitz later discovered that Appellant proceeded to the hospital.

Dr. Harold Polk is the medical director for the emergency room at the Wayne County Medical Center where the victim was taken. On the day in question he was at the hospital teaching a class. He went to the emergency room in response to a "Code Blue" that had been called at the hospital. He and another doctor went outside the emergency room to await the ambulance. He saw a car rapidly approaching the emergency room. He saw the driver get out of the car, and later learned that it was Appellant. Appellant appeared to be very upset and was asking where the ambulance was. Appellant's clothes were stained with lots of blood. The ambulance arrived at 7:45 p.m. Emergency personnel wheeled the victim into the emergency room. Dr. Polk noticed that she was covered in blood and that there was an injury to her forehead. The victim was not responding to any efforts by emergency personnel. The hospital had been told that the victim was pregnant, Dr. Polk had assembled a surgery team to attempt to save the infant. The surgery team performed a cesarean section. When the infant was delivered it was dead. Dr. Polk stated that an infant born at thirty-two weeks, the age of the victim's infant, who was in the same physical condition as far as weight, "would have very much a potential to survive." Dr. Polk had an opportunity to speak with Appellant. Appellant told Dr. Polk that the victim had grabbed the gun from him, and then Appellant pointed his hands at his head and said "bang."

Chief Seitz remained at the scene after the ambulance left. He and Sergeant Ray taped off and secured the scene. The Tennessee Bureau of Investigation ("TBI") crime scene investigators arrived around 9:30 p.m. The TBI investigators took pictures of the scene and collected evidence. Chief Seitz said that the TBI agents found two empty bullet casings laying on the floor, about a foot and a half in front of the couch. Several 9 millimeter casings with bullets in them were found in between the cushions of the couch. Chief Seitz also observed a bullet hole that started at the top of one cushion, exited at the bottom of the cushion, entered the wall behind the couch, and lodged in an electrical outlet on the other side of the wall. This bullet hole was directly behind where the victim's head had been when she was sitting on the couch. A second bullet hole was found in the living room inside the front entrance. This wall is on the opposite wall from the couch.

Chief Seitz also conducted a search about thirty yards behind the house. He found a black weapons carrying case at the edge of the woods bordering the backyard. Chief Seitz called one of the TBI agents out to investigate it. The TBI agent collected the case and opened it in Chief Seitz's presence. It contained a Tach 9, which can be either an automatic or semi-automatic pistol.

Sergeant Ray noticed that there was a blue Toyota sitting in the driveway. There was blood smeared on the driver's side door. When Appellant carried the victim out of the house toward Chief Seitz, Sergeant Ray was in the vicinity. He stated that the smell of alcohol on Appellant was obvious. Sergeant Ray stated that if Appellant had been driving and Sergeant Ray had pulled him over, the level of alcohol smell on Appellant would have prompted him to administer some field sobriety tests. Sergeant Ray stated that he interviewed Falen Swafford, Appellant's sister. Miss Swafford told him that Appellant and the victim had been fighting.

At the time of the incident, Chief Byron Skelton was an investigator with the Waynesboro Police Department. He arrived at the scene at 7:49 p.m. the day of the incident. He went inside the house and saw a couch with a large pool of blood and a gun laying on the right end of the couch. He also noticed some broken pottery and furniture that had been turned over in the dining room. Chief Skelton also found a telephone laying on the floor in the kitchen with a large concentration of blood around it. The kitchen is behind the living room and is separated from the living room by a wall. Chief Skelton went to the hospital to observe the victim. He stated that she had a star-shaped, entrance wound on her forehead and an exit wound at the base of her skull.

Chief Skelton and another investigator proceeded to the Wayne County Jail to interview Appellant. The officers *Mirandized* Appellant. Appellant was calm throughout this exchange. The other officer informed Appellant that the victim had died. Appellant jumped from the chair he had been sitting in and turned the table over. He dropped to the floor and accused the officers of "messing with him." Appellant curled up on the floor in a fetal position. Chief Skelton attempted to console Appellant. Appellant grabbed his hair with both hands and began beating his head on the floor. Chief Skelton calmed Appellant down and convinced Appellant to sit in a chair. Chief Skelton asked Appellant what had happened. Appellant answered Chief Skelton's questions calmly and logically. Appellant told Chief Skelton that he had been moving furniture and went to Willie's Bar and Grill afterwards. He called the victim to come pick him up at Willie's. When they arrived home, he decided he wanted to go back. The victim began "bitching and raising hell" about Appellant returning to the bar. He grabbed his Jennings 9 from the couch and put it in his back pocket. The victim grabbed it out of his pocket. Appellant turned around and reached for the gun, and it went off twice. Appellant admitted to Chief Skelton that he was already

carrying a Tach 9 when he arrived home. He told Chief Skelton that he threw the Tach 9 in the woods after the shooting because he thought that it was illegal. Appellant also told Chief Skelton that he called the operator after the victim was shot. Chief Skelton confirmed that Appellant called the operator at 7:20 p.m.

Special Agent Wayne Wesson is a criminal investigator with the TBI. He was called to the scene around 9:00 p.m. and arrived around 9:30 p.m. He was escorted to the house by Sergeant Ray. When he arrived, Agent Wesson looked through the window and saw that the house was in disarray. There was blood on both the couch and the storm window on the front porch. Sergeant Ray informed Agent Wesson that the victim had already been transported to the hospital. At the hospital, Sergeant Ray photographed the wounds on the victim's body. He photographed a contact wound to the forehead and an exit wound in the hairline on the back of her head. Agent Wesson stated that the wound to the forehead was a classic contact wound because with a contact wound "you find a star-shaped splitting of the skin because the gases that are expelled from the barrel, as the bullet is projected out of the barrel, do not go into the skull. They disperse beneath the skin and explode backwards, giving you a star-shaped wound." To achieve a contact wound, the weapon must be placed against the skin.

Agent Wesson spoke with Appellant while he was at the hospital. He took an oral statement. Appellant was very upset at the hospital, but was not hysterical during the interview until the end of the interview. Agent Wesson asked Appellant what had happened to the victim and how she ended up with a gunshot wound to the forehead. Agent Wesson also asked Appellant if the gun on the couch or the gun in the woods is what Appellant shot her with. Agent Wesson testified to the following exchange with Appellant:

> I asked him to tell me what happened. He said that he had gotten home from Willie's and was going to go back to Willie's and that Susan started bitching and she didn't want him to go. So he said he went into the house to get his gun out from under the cushion, out from under the couch cushion; he stuck it in his back pocket, and that she grabbed it out. As he started back out of the house, she grabbed the gun out of his back pocket. He said he wanted it back, so he grabbed for it. I asked him why he grabbed for it, and he said because it was his and because he wanted it.
>
> I asked him if it was an accident – I'm sorry. I asked him what happened then, and he said "It was an accident. I grabbed for the gun and it fired." I said "Where were your hands when the gun went off?" And he said "I don't know." I said "Where were her hands when the gun went off? He

said "I don't know. I don't remember." I said "Why did you throw the gun in the woods behind the house?" He said "Because I wasn't supposed to have it. It was illegal."

I said "Which one of the guns was she killed with, Bryan?" And he became very upset, said "The Jennings, the one I laid on the couch." I said "After she was shot, what did you do with the gun?" He said "I laid it on the couch. I laid it on the couch." I said "Well, Bryan, I'd like to take a gunshot residue of your hands," and he became upset and that's when he told his mother I was trying to fuck him.

Agent Wesson stated that the officers secured a search warrant to take a blood sample from Appellant because he would not consent to giving a blood sample. They also collected Appellant's clothes to be tested for gunshot residue. The test found gunshot residue on his shirt and pants. Agent Wesson did not obtain samples to have a gunshot residue test performed for Appellant's hands. He did testify that if an individual was shot in the forehead by a weapon pressed to the forehead, the victim would have gunshot residue on their body.

The gun found in the home was a Jennings nine millimeter, semi-automatic. Two shell casings that were found on the floor in front of the couch were sent to the TBI crime lab and were determined to have been fired from the Jennings 9. Agent Wesson found two bullets, one in the wall behind the couch and another in the frame surrounding the front door. Both bullets were nine millimeters and would have fit the Jennings 9.

Special Agent James Davis is a forensic scientist with the TBI. Agent Davis works in the micro analysis section which includes gunshot residue analysis. Agent Davis received a gunshot residue kit recovered from the hands of the victim, as well as, the pants and shirt of Appellant. Agent Davis found gunshot residue on both the pants and the shirt. The pattern of the gunshot residue found on the shirt and pants is consistent with an individual who held a gun tightly to a victim's forehead and fired the gun which caused the gases in the weapon to blow backwards. With regard to the gunshot residue kit from the victim's hands, Agent Davis testified that the results were inconclusive. However, he did not find the amount of residue on her hands that he would have thought would be on a shooter's hands. If someone was holding a gun and shot themselves in the head, there would have been a significant amount of residue on their hands.

Agent Steve Scott works in the firearms identification section of the TBI laboratory. He tested that Jennings 9 and concluded that the two shell casings found in front of the couch

were fired from that weapon. He also testified that the weapon in question was not a hair trigger gun, but required seven pounds of force to pull the trigger.

Dr. Charles Harlan was the medical examiner and the consulting forensic pathologist for Wayne County. He performed the autopsies on the victim and the baby boy. He stated that the victim had a gunshot wound to the forehead that was in the shape of a star and exhibited the presence of black powder on the edges of the wound. An exit wound was examined at the base of the skull. There was a seven inch difference between the height of the two wounds. The bullet traveled from front to back. The star-shaped wound with black powder is indicative of a tight contact gunshot wound. In the case at hand, a tight contact gunshot wound is created by the weapon being pressed against the skin when the weapon is discharged. It is not physically possible to create such a wound from the gun being shot from an arm's length away. He stated that when considering the path of the bullet through the couch, the victim's head would have had to have been laying on the top of the couch cushion. Dr. Harlan concluded that the cause of death was a tight gunshot wound to the head.

Dr. Harlan also completed an autopsy on the victim's baby. Dr. Harlan estimated that the fetus was at a gestational age of thirty-three weeks. The cause of death was intrauterine hypoxia which is a shortage of oxygen to the fetus caused by the mother's death. In other words, the mother's death caused the death of the child. Dr. Harlan estimated that the fetus would have survived five to ten minutes after the victim had been shot. He also stated that "[t]here's no question that this child would have been viable."

At the close of the State's proof, the State entered a lab report which stated that Appellant's blood alcohol level when taken at the Wayne County Hospital was .02. This information was entered as a stipulation at trial.

Appellant began his case with the testimony of William Pope and Jerry Pope who know both Appellant and Mr. Moyer. They both testified that Mr. Moyer told them that when the police came to question him about the victim's death, he was smoking marijuana. Mr. Moyer also told them that because the police had caught him smoking marijuana he told the police whatever they wanted know.

Wesley Staggs worked for Appellant's father doing various things. On the day in question, Mr. Staggs was helping Appellant move furniture from a storage unit in Florence, Alabama to the house in Waynesboro. While they were at the storage unit, Appellant showed Mr. Staggs a sawed-off shotgun that he kept under the cushions of the couch. He stated that on the way back from Alabama they stopped at a bar just across the state line. They each drank one beer. They drove to Collinwood and stopped at a combination store and bar owned by Appellant's father. Mr. Staggs had a beer, but Appellant did not want one. Mr.

Staggs and Appellant discussed a gun that Appellant wanted to sell him. Appellant had the gun in the glove compartment, but Mr. Staggs did not see it. Mr. Staggs did not buy the gun because he did not have the money. He dropped Appellant off at Appellant's house around twenty minutes until 4:00. Mr. Staggs was not planning on returning to Willie's that day.

George Pulley is friends with Appellant and Mr. Moyer. He was at Willie's the day the incident occurred. He saw Mr. Staggs and Appellant come into the bar. Mr. Staggs had one beer and left. Appellant stayed but only drank one beer. Mr. Pulley would not let him have more than that because Appellant could not pay for it. Mr. Pulley and Appellant did not discuss Appellant selling him a gun at Willie's. Appellant did not show Mr. Pulley a gun or say anything about coming back with a gun. Appellant's wife and kids picked Appellant up from Willie's.

Falen Swafford is Appellant's half-sister. She was eleven years old at the time of the incident. The victim was babysitting Miss Swafford and several other family members at the house the day the victim was shot. The victim, Miss Swafford, and the other children picked up Appellant from Willie's. Miss Swafford recalled that the victim and Appellant were arguing. When they left Willie's, they returned to the house on Mink Branch Road. This was the house to which the victim and Appellant were moving. When they arrived at the house, Appellant and the victim were arguing. Miss Swafford saw the victim grab something out of Appellant's back pocket which Miss Swafford thought was a set of keys. Appellant attempted to get the item back from the victim. Miss Swafford was outside watching through a glass door. She saw the victim walk over to the big couch. At that point, she could no longer see the victim and Appellant, but she could hear them arguing and glass breaking. Miss Swafford heard a shot and looked inside. Appellant was screaming and going crazy. The victim was on the couch. Miss Swafford could see blood near the victim's ears and on her nose. Appellant was screaming, "Oh, my God. She's been shot." Appellant came out of the house and told Miss Swafford to call the police. She grabbed the children and ran across the street. Miss Swafford saw Appellant carry the victim out of the house. She also saw her mother, the police, and the ambulance arrive.

Miss Swafford gave a statement about the incident to Agent Wesson. She admitted that she had a better recollection of what happened when she gave the statement because it was closer in time. Miss Swafford denied that she saw a gun, even when the State produced her statement in which she stated she saw the gun.

Dale Ray is a paramedic who was in the ambulance that responded to the call about the victim's shooting. When the ambulance arrived, Mr. Ray saw Appellant carrying the victim out of the house and into the yard. Mr. Ray and the other technician began to work on the victim. While they were working on her, Appellant was screaming, grabbing their

arms, and begging the paramedics not to let the victim die. They moved her to the ambulance and took her to the hospital. Appellant arrived at the hospital before the ambulance. Mr. Ray observed that Appellant was still hysterical and continued to beg them to not let the victim die.

Appellant was the final witness at the trial. At the time of the incident, Appellant and the victim were in the process of moving from Alabama to the Mink Branch house. Their financial status at the time was "tight." On the morning of the incident, Appellant went with Mr. Staggs down to Alabama to pick up furniture to bring back to Tennessee. They stopped at two bars on the way back to Tennessee. They returned to the Mink Branch house and began to unload the furniture. After unloading the furniture, Mr. Staggs left. The victim drove Appellant to a trailer across from Willie's bar so he could help his father refurbish it. After finishing in the trailer, Appellant went to Willie's and called the victim to come pick him up. She arrived with all the children. Appellant got in the car, and they returned to the Mink Branch house.

When they arrived at the house, the victim and Appellant began to argue because he wanted to return to Willie's. The victim did not want him to go because there were a few women there she did not like. Appellant explained that the victim did not like these women because he had engaged in extramarital affairs. The victim grabbed the keys from Appellant during the argument. Appellant grabbed the keys back from the victim. The victim went and sat on the couch. Appellant reached over and got the gun from under the cushion. Appellant wanted to sell the gun to someone at Willie's. When Appellant walked past her, the victim grabbed the gun out of his back pocket. They then wrestled for the gun. They hit each other while wrestling for the gun. The victim was sitting on the couch, and Appellant was standing over her. The victim pulled the gun back towards herself, and the gun fired. After the shot was fired, Appellant ran to the door to tell the children to call "911." He next grabbed the other gun case and threw the other gun in the woods because he was afraid it was an illegal gun. He called "911." He did not independently remember carrying the victim outside, but he did remember the ambulance arriving. Appellant drove to the hospital and stopped at Willie's and the Handy Mart on the way to look for his father. Appellant left the hospital when the police took him to the jail. After spending some time in a cell, Officer Skelton and another officer questioned him. They first told Appellant that the victim and their unborn child had died. On cross-examination, Appellant admitted that he and the victim had a tempestuous, violent relationship. He admitted to hitting the victim on previous occasions. He stated that he kept the gun under the cushion of the couch on a regular basis. The gun was fully loaded with one bullet in the chamber at all times. The safety of the gun was kept engaged. Appellant maintained that he did not intentionally shoot the victim. He also denied threatening to kill her or their unborn child.

At the conclusion of the presentation of the evidence, the jury found Appellant guilty of first degree murder for the shooting death of the victim and guilty of second degree murder for the death of his unborn child. The trial court held a separate sentencing hearing on July 25, 2000. The trial court sentenced Appellant to life imprisonment for the first degree murder conviction and twenty-three years for the second degree murder conviction. The trial court found that Appellant was a dangerous offender and ordered that the sentences be served consecutively. A timely motion for new trial was filed. Due to multiple changes in counsel, amendments to the motion for new trial, and evidence gathering, the trial court's order overruling Appellant's motion for new trial was not filed until February 1, 2008. A timely notice of appeal was filed.

## ANALYSIS

### Sufficiency

Appellant argues on appeal that the evidence was insufficient to prove premeditation and, therefore, support his conviction for first degree murder. With regard to his conviction for second degree murder, Appellant argues that because the death of the victim was "not the fault of the Defendant, and certainly not the result of a premeditated act" the evidence was insufficient. The State argues that there was sufficient proof of premeditation to support his convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reevaluating the evidence when considering the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*,

805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

First Degree Murder

It should first be noted that this Court found in Appellant's first appeal that virtually the same evidence presented in the present appeal was sufficient to sustain a conviction for the first degree of the victim. *Bryan A. Milam*, 1999 WL 701419, at *4

First degree murder is described as:

> (1) A premeditated and intentional killing of another;
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or . . . .

T.C.A. § 39-13-202(a) (1997). Tennessee Code Annotated section 39-13-202(d) (1997) provides that:

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

An intentional act requires that the person have the desire to engage in the conduct or cause the result. T.C.A. § 39-11-106(a)(18) (1997). Whether the evidence was sufficient depends entirely on whether the State was able to establish beyond a reasonable doubt the element of premeditation. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d

85, 108 (Tenn. 2006); *see also State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998).

Premeditation may be proved by circumstantial evidence. *See, e .g., State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992). Our supreme court has identified a number of circumstances from which the jury may infer premeditation: (1) the use of a deadly weapon upon an unarmed victim; (2) the particular cruelty of the killing; (3) the defendant's threats or declarations of intent to kill; (4) the defendant's procurement of a weapon; (5) any preparations to conceal the crime undertaken before the crime is committed; (6) destruction or secretion of evidence of the killing; and (7) a defendant's calmness immediately after the killing. *See State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *Pike*, 978 S.W.2d at 914-15. This list, however, is not exhaustive and serves only to demonstrate that premeditation may be established by any evidence from which the jury may infer that the killing was done "after the exercise of reflection and judgment." T.C.A. § 39-13-202(d); *see Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660.

One learned treatise states that premeditation may be inferred from events that occur before and at the time of the killing:

> Three categories of evidence are important for [the] purpose [of inferring premeditation]: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planning activity; (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) (2d ed.2003) (emphasis in original).

In the case at hand, the jury concluded that Appellant acted with premeditation when killing the victim. Several of the circumstances listed by our supreme court from which a trier of fact can infer premeditation were present in the facts presented to the jury. Appellant used a deadly weapon, the gun, to kill the unarmed victim. In addition, there was a witness who testified that Appellant had threatened a few days before the murder to kill both the victim and their unborn child. There was also evidence from more than one witness that immediately after the murder, Appellant went to his car, retrieved a second gun, and threw the second gun into the woods behind his house. Appellant stated that he hid the second gun

because he was under the impression that it was illegal to own such a gun. Appellant had the presence of mind to try to hide something he thought to be illegal presumably because he knew the police would come to his house to investigate his wife's death. This clearly shows calmness immediately after shooting the victim. In addition, there was testimony that the nature of the gunshot wound to the victim's forehead lead to the conclusion that the gun was pressed tightly against her head when it was fired. This supports the conclusion that Appellant intentionally shot the victim in the forehead as opposed to his story that the gun accidentally went off while they were struggling over it.

As stated above, the trier of fact is determines the credibility of the witnesses, any issues of fact, and the weight to be given the evidence presented at trial. *Pruett*, 788 S.W.2d at 561. The jury clearly found that Appellant acted both intentionally and with premeditation when he shot the victim in the forehead. We conclude that when the evidence is viewed in a manner that favors the State, there is sufficient evidence to support the jury's verdict with regard to the first degree murder conviction.

Second Degree Murder

Second degree murder is a "knowing killing of another." T.C.A. § 39-13-210(a). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result . . . ." T.C.A. § 39-11-106(a)(20). In *State v. Jason Curtis Johnson*, No. M2003-03060-CCA-R3-CD, 2006 WL 407767 (Tenn. Crim. App., at Nashville, Feb. 17, 2006), *perm. app. denied*, (Tenn. June 26, 2006), the defendant was convicted of first degree murder of the victim and second degree murder of the victim's unborn fetus. With regard to sufficiency of the evidence of second degree murder of the fetus, this Court stated that several facts supported a finding of guilt. Those facts included that the defendant had admitted that he knew the victim was pregnant, the defendant shot the victim in the head a close range, implying premeditation and intent to kill the victim, and a doctor testified that the fetus was viable.

All three of these facts are also present in the case at hand. There is no dispute that Appellant knew his wife was pregnant. As stated above, we have already concluded that there was sufficient evidence to support Appellant's conviction for first degree murder. Also, a doctor testified at trial that the fetus was indeed viable at the time of the murder. We conclude that there is ample evidence to support the finding that Appellant would have been aware that his intentional killing of the victim would lead to the death of his unborn child.

Therefore, this issue is without merit.

## Falen Swafford Statement

Appellant argues that the trial court erred when it allowed Officer Ray, on redirect examination, to testify regarding statements made to him by Falen Swafford, Appellant's half-sister. Appellant argues that the statements were inadmissible hearsay. The State argues that the statements were properly allowed under the "curative admissibility" doctrine.

The following exchange occurred on cross-examination of Officer Ray:

Q. Did you talk with Falen Swafford?

A. Yes, sir.

Q. She told you that her brother and his wife had been fighting didn't she?

A. Yes, sir.

When redirect examination began, the State asked for a jury-out hearing. The State argued that Appellant had opened the door regarding Miss Swafford's statement and had "led the Jury to believe that they were fighting. I think we should be entitled to question this officer, who talked with Falen, in more detail about that." Appellant's counsel stated that he did not think that he had "opened the door" and that he was surprised that the State had not objected to his line of questioning. Appellant's counsel also argued that any further testimony about Miss Swafford's statements to Officer Ray would be hearsay and that the only possible exception he could think of would be excited utterance, and that would not apply because Miss Swafford's statements to Officer Ray were made during an interview. Therefore, Appellant's counsel concluded that any further statements would not be admissible. After hearing argument from Appellant, the trial court concluded that the State could ask the officer, "Did Falen Swafford make any other statements to you?" Appellant disagreed, and the trial court noted Appellant's exception. When the jury returned to the courtroom, the State asked Officer Ray what else Miss Swafford had told him. Officer Ray stated the following:

> A. She told me that her and her sister, Hilary, Bryan's two kids, Mary and Nicholas Milam, and Bryan's niece, Katlin Ingram, were being baby-sat by Bryan's wife, Susan; that they were all in front of the house and playing in the yard; and that they heard Bryan and Susan fighting. And she said that this went on for a few minutes, and then they heard a gunshot.

Falen said at that point she ran over to the front door of the house and saw Bryan standing in front of Susan, who was on the couch. Falen said that Bryan had a gun in his hand and laid the gun on the couch beside Susan and then ran outside and told her to call "911."

Q. Were there any other statements that she made?

A. Yes, sir. She also said that during the argument that Bryan and Susan was having that she heard the two arguing and that Susan yelled "Get that thing away" at one point during the argument.

We first address the State's argument that Officer Ray's testimony about Falen Swafford's statements to him were not hearsay. Rule 801(c) of the Tennessee Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay statements are generally not allowed into evidence. Tenn. R. Evid. 802. The State argues that the statements were not offered to prove the truth of the matter asserted. We disagree. Clearly the State's intent in introducing testimony from Officer Ray regarding Miss Swafford's statement was to include that fact that Appellant was standing over the victim and that he had the gun in his hand and that the victim was asking Appellant to put the gun away.

As stated above, the State also relies upon the doctrine of "curative admissibility." This Court set out the doctrine in *State v. Land*, 34 S.W.3d 516 (Tenn. Crim. App. 2000), in the following manner:

> Most often employed in criminal cases where the "door" to a particular subject is opened by defense counsel on cross-examination, the doctrine of curative admissibility permits the State, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination. *See People v. Manning*, 182 Ill.2d 193, 230 Ill. Dec. 933, 695 N.E.2d 423, 422 (1998) (citations omitted). This doctrine provides that "[w]here a defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissable evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *See State v. Armentrout*, 8 S.W.3d 99, 111 (Mo. 1999) (citing *State v. Weaver*, 912 S.W.2d 499, 510 (Mo. banc 1995), *cert. denied*, 519 U.S. 856, 117 S. Ct. 153, 136 L.Ed.2d 98 (1996)); *see also Rastall v. CSX Transportation, Inc.*, 697 A.2d 46, 52 (D.C. 1997) (in the interest of fairness, otherwise inadmissible evidence may be admitted to the extent

necessary to remove prejudice when a party opens the door to its admission); *U.S. v. Monroe*, 437 F.2d 684, 686 (D.C. Cir. 1970) (doctrine of "curative admissibility" allows one party to introduce evidence that might otherwise be excluded to counter unfair prejudicial use of the same evidence by the opposing party); 21 Fed. Prac. & Proc. Evid. § 5039 (1977). In other words, "[i]f A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." *Manning*, 230 Ill. Dec. 933, 695 N.E.2d at 433 (citations omitted).

The rule is derived from the fundamental guarantee of fairness. That is, the rule operates to prevent one party from manipulating the rules of evidence so as to leave the jury with feelings about the case that are unjustified, even though the jury's emotional response to the case is, theoretically, not a consideration in determining admissibility. *See* 22 Fed. Prac. & Proc. Evid. § 5165. Specifically, in a criminal case, "[t]he rule operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the Government being able to place them in their proper context." *Lampkins v. United States*, 515 A.2d 428, 431 (D.C. 1986) (citations omitted).

Notwithstanding, the doctrine's applicability is limited by, "the necessity of removing prejudice in the interest of fairness." *Crawford v. United States*, 198 F.2d 976, 979 (1952) (D.C. Cir. 1952) (citations omitted). It is not an unconstrained remedy permitting introduction of inadmissible evidence merely because the opposing party brought out evidence on the same subject. *Manning*, 230 Ill. Dec. 933, 695 N.E.2d at 434 (citation omitted). The rule is protective and goes only so far as is necessary to shield a party from adverse inferences and is not to be converted into a doctrine for injecting prejudice. *Id.* (citation omitted). Only that evidence which is necessary to dispel the unfair prejudice resulting from the cross-examination is admissible. *United States v. Winston*, 447 F.2d 1236 (D.C. Cir. 1971). *See also Dyson v. United States*, 450 A.2d 432, 442 (D.C. 1982) (citations omitted) (introduction of incompetent or irrelevant evidence by a party opens the door to admission of otherwise inadmissible evidence only to extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence). Since the application of the doctrine of curative admissibility is based on the notion that the jury might be misled if contradictory evidence was excluded, the doctrine should not justify admission of that evidence when it is

likely to do more harm in this respect than good. *See* 27 Fed. Prac. & Proc. Evid. § 6096 (1990).

> When constitutional rights are involved, the court must be particularly certain that the case is appropriate for curative admissibility by requiring a clear showing of prejudice before the open the door rule of rebuttal may be involved. *Lampkins*, 515 A.2d at 431 (citations omitted). If the trial court decides to admit such testimony on a theory of curative admissibility, however, its decision will not be reversed on appeal unless the appellant can demonstrate a clear abuse of discretion. *See generally* [*State v.*] *Chearis*, 995 S.W.2d [641,] 645 [(Tenn. Crim. App. 1999)]. In the present case, . . . the appellant's voluntary interjection of the issue, absent objection by the State, "opened the door" for the admission of otherwise inadmissible evidence to the extent necessary to remove the unfair prejudice. *See Lampkins*, 515 A.2d at 431 (citation omitted); *see also State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486, 501 (1999), *petition for certiorari filed*, (Jan. 7, 2000) ("The law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself."). . . . Thus, the State could introduce otherwise inadmissible evidence to the extent necessary to remove the unfair prejudice which might otherwise have ensued from the original evidence. *See California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956).

*Land*, 34 S.W.3d at 530-32.

When Tennessee courts have upheld the application of the doctrine of curative admissibility in other cases, often the trial court has previously entered an order of some sort that prohibits the State from asking questions concerning the evidence in question. In *Land*, this Court held that the trial court had not abused its discretion in allowing the complained of testimony. As part of our analysis, we pointed out that the trial court had previously granted a defense objection regarding a detective's testimony about a telephone conversation with the defendant's mother. The trial court's ruling stated that testimony regarding this telephone conversation was inadmissible hearsay. On cross-examination, the defendant's attorney repeatedly asked the detective a question which was unanswerable due to the trial court's earlier hearsay ruling. The effect of this line of questioning left the impression that there was no proof of the crime charged and the defendant had been wrongfully charged. *Id.* at 530. Likewise in *State v. Rowland Keith Hall*, No. E2006-00111-CCA-R3-CD, 2007 WL 1582667 (Tenn. Crim. App., at Knoxville, July 1, 2007), *perm. app. denied*, (Tenn. Dec. 26, 2007), the trial court had granted a defense hearsay objection only on cross-examination to have the defense voluntarily elicit information related to the evidence which had been held inadmissible during direct examination. *Rowland Keith Hall*, 2007 WL 1582667, at *9.

In the case at hand, the trial court did not make a previous ruling regarding Officer Ray's testimony about Miss Swafford's statement to him. The State did not attempt to question Officer Ray regarding the statement. The contents of Miss Swafford's statement to Officer Ray was initially intentionally elicited by Appellant on cross-examination. Appellant's counsel's assertion that the remainder of the statement should not be admitted based upon hearsay and urging the trial court to rule thusly is tantamount to reliance upon a trial court's previous ruling that evidence is inadmissible. We stated in *Land*, "Assuming that the State would not be permitted to place the fact in the proper context, defense counsel's cross-examination was a calculated move intended to relay to the jury the inference that the appellant was arrested on the charge of theft with no basis or proof." In the case at hand, Appellant's counsel's statement that the State should have objected and that any further evidence should be inadmissible based upon hearsay implies that trial counsel's questioning of Officer Ray about Miss Swafford's statement that the victim and Appellant were fighting was a calculated move to place into evidence that the two were fighting to support the theory that the victim and Appellant were wrestling for control of the gun. Therefore, the State's further questioning of Officer Ray about Miss Swafford's statement properly placed into context the testimony elicited by Appellant on cross-examination. The trial court did not abuse its discretion in allowing this testimony into evidence.

We also point out that there is no issue with regard to Appellant's constitutional right to confront witnesses against him because Miss Swafford testified later in the trial. *See Land*, 34 S.W.3d at 532.

**Juror Billy Hill**

Appellant argues that the trial court erred in not ordering a new trial due to Juror Billy Hill's statement that he could not participate in deliberations after the jury had retired to deliberate. The State argues that a new trial is not warranted because Appellant did not contemporaneously object and if there was error, it does not rise to the level of plain error required for our review of the issue.

After the jury had retired to deliberate, the trial court received a note from the foreman regarding Juror Billy Hill. The following exchange occurred:

> The Court: Come in, Mr. Hill. Do you want to just have a seat right there? I've looked at this note . . .
>
> . . . .

The Court: . . . I'll just read it to you. You signed it.

Mr. Hill: Yes, sir.

The Court: Due to personal and past experience you feel that you cannot vote either way about his matter?

Mr. Hill: Well, Judge, I used to do a lot of drinking, drank a lot; I mean a lot. Me and my wife had problems years ago, several years ago, and I done the same thing – it wasn't no gun involved – that this fellow here did. I just don't feel like I would have the right to vote on something that he did, when I done the same thing he did.

The Court: Well, sir, don't you remember me telling you all time and time again when we were selecting you that your decision in this case, regardless of what it is, guilty or not guilty, has to be based on evidence that you heard from that seat where you're sitting and applying the law and that nothing outside of that can enter into your decision? Do you remember me saying that?

Mr. Hill: Yes, sir, I do.

The Court: And you, along with the others, all said that you could do that.

Mr. Hill: Well, I thought I could, Judge. But then this has got to where I got to thinking about this. I said "Good gracious. If I vote against him, they'd say, well, I'm no better than he is. I done the same thing he did."

The Court: That doesn't enter into your decision. You promised me under oath that you could do that.

Mr. Hill: Well, that was really before I got to studying about this. And I just happened to think what happened.

The Court: That doesn't have anything to do with this case, absolutely nothing. The only thing that you're to think about as a juror in this case is the evidence you heard from that chair right there, those exhibits like the guns and the pictures and the diagrams, and the law that I gave you. You're not supposed to think about anything else.

Mr. Hill: I've got no problem with that.

The Court: Can you do that for me?

Mr. Hill: Yes, sir.

. . . .

The Court: You're a human being and all that, but I'm telling [sic] that you just forget about anything you've ever done in the past and you go in there. And, whatever decision you reach in this case, you be sure that that decision was based on the evidence, the exhibits and the law.

Mr. Hill: I can handle that.

Juror Hill returned to deliberate with the jury. Appellant did not lodge an objection or complaint to the continuing deliberations of the jury after the exchange between the trial court and Juror Hill.

Because Appellant did not contemporaneously object to Juror Hill's rejoining the jury, this issue would ordinarily be waived. However, this court may address this issue under the plain error doctrine. In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *See State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting this Court's plain error test set forth in *State v. Adkisson*, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994)); *see also* Tenn. R. Crim. P. 36(b).

The record clearly establishes what occurred in the trial court, so we turn to whether a clear and unequivocal rule of law has been breached. Appellant relies on *Kersey v. State*, 525 S.W.2d 129 (Tenn. 1975), to support his argument. In *Kersey*, our supreme court concluded that "the interests of justice demand the rejection of the "dynamite charge" as adopted in *Simmons v. State*, 281 S.W.2d 487 (1955). *Kersey*, 525 S.W.2d at 144. The dynamite charge is an instruction given to a deadlocked jury to encourage the members of the jury to come to an agreement and avoid a mistrial. *See id.* The *Kersey* court stated the following:

> Under the inherent and the statutory supervisory power of this Court, we advise the trial bench that when a jury's deliberations have not produced a verdict, and it returns to the courtroom and so reports, the presiding judge should admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view. The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations. If the trial judge feels that further deliberations might be productive, he may give supplemental instructions in accordance with subsequent portions of this opinion. *See State v. Hutchins*, 43 N.J. 85, 202 A.2d 678 (1964).

*Id.* at 141.

In this case, the jury had retired for deliberation. However, it does not appear from the record that the jury had even taken a vote. The jury did not report to the trial court that they were unable to reach a decision. Instead, the trial court received a message from the foreman that one of the jurors had reservations about serving on the jury. Appellant argues that Juror Hill's reluctance to continue to serve on the jury leads to the conclusion that the jury would have been deadlocked and, therefore, the *Kersey* analysis applies. We believe that to reach this conclusion is a huge leap in logic. The more appropriate analysis of this factual situation is whether Appellant's Sixth Amendment right to trial by jury was violated by the situation that occurred with regard to Juror Hill.

We now turn to the true question raised by the factual scenario. Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury. U.S. Const. amend VI; Tenn. Const. art. 1, § 6; *see State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991); *Willard v. State*, 130 S.W.2d 99 (Tenn. 1939). This right includes that a trial be heard by twelve jurors and "to have all issues of fact submitted to the same jury at the same time." *Bobo*, 814 S.W.2d at 356. This Court has stated, "Both the defendant and the State are entitled to a fair trial by unbiased jurors and it is the duty of the Trial Judge to discharge any juror who for any reason cannot or will not do his duty in this regard." *Walden v. State*, 542 S.W.2d 635, 637 (Tenn. Crim. App. 1976). In addition, "the trial judge . . . is ultimately responsible for every aspect of the orchestration of a trial." *State v. McCray*, 614 S.W.2d 90, 93 (Tenn. Crim. App. 1981).

In *State v. Bobo*, 814 S.W.2d 353 (Tenn. 1991), after the jury retired, the trial court discovered that one of the jurors told the remaining members of the jury that she believed the co-defendant had killed her twelve-year-old cousin. 814 S.W.2d at 354. The trial court questioned the other members of the jury who all stated that they could "put the matter out of their mind[s]" and continue deliberations. *Id.* The trial court dismissed the juror who had

made the prejudicial statement and recalled one of the alternate jurors who had been dismissed. *Id.* The supreme court determined that the defendant's constitutional rights were violated because ultimately thirteen jurors participated in the deliberations to determine the defendant's guilt. *Id.* at 356.

In *State v. Forbes*, 918 S.W.2d 431 (Tenn. Crim. App. 1995), a juror expressed concern, during the trial, about what she thought was coaching of a witness by one of the attorneys. 918 S.W.2d at 450. The attorney informed the trial court that he was nodding in response to questions from co-counsel concerning another issue at trial. The trial court held a colloquy with the juror and told the juror the attorney's explanation. *Id.* at 451. At the conclusion, the trial court left the juror on the panel because the juror stated that her judgment in the case would not be affected by what she witnessed. *Id.* This Court held that the trial court did not abuse its discretion by failing to replace the juror. We stated, "The reason the trial court is afforded discretion in these matters is its ability to engage in precisely this type of inquiry and to observe the demeanor and credibility of the juror." *Id.*

In *State v. Mathis*, 969 S.W.2d 418 (Tenn. Crim. App. 1997), the proof had been concluded and the trial court was adjourned on a Friday afternoon. 969 S.W.2d at 422. On Tuesday morning, when the jury returned, the trial court was informed that the father of one of the jurors had died over the weekend and the funeral was to be held that afternoon. *Id.* The trial court brought the juror into the courtroom and asked if she would be able to deliberate. She said she could so long as she was able to leave to attend the funeral. *Id.* The trial court stated that the jury would cease deliberations in time for her to attend the funeral and stated that the juror was perfectly competent to deliberate. On appeal, we held that there was not an abuse of discretion on the part of the trial court. *Id.*

In the situation at hand, we conclude that the trial court did not abuse its discretion in not *sua sponte* ordering a mistrial, nor did the continued deliberations of the jury violate Appellant's constitutional right to a jury trial. The trial court properly brought the juror in to question him regarding any bias or prejudice. The trial court determined that Juror Hill did not have a bias either towards or against Appellant, but rather was having a personal crisis of conscience. At the conclusion of the colloquy, Juror Hill stated that he could analyze the evidence presented at trial and vote purely on the basis of the evidence. The trial court acted properly in ascertaining that Juror Hill had no bias or prejudice that would affect his voting, therefore, there was no abuse of discretion. There was not a violation of the constitutional right to a trial by jury because the same twelve jurors that began deliberations ultimately made the determination of Appellant's guilt or innocence. Therefore, Appellant is unable to meet the second or third prong of the plain error doctrine, that an unequivocal rule of law has been breached or that a substantial right of the accused was adversely affected.

Also, we would be remiss if we did not mention that it appears that Appellant did not object to Juror Hill's continued deliberation for tactical reasons. Juror Hill admitted that he identified with the behavior of Appellant towards his wife. He hinted that he had treated someone in an abusive manner and was prone to excessive drinking. We believe that Appellant could have thought that such an individual on the jury would be advantageous to him. Therefore, we conclude that Appellant cannot clearly prove that he failed to object to Juror Hill returning to deliberate for other than tactical reasons.

Appellant cannot meet the test set out for review under the plain error doctrine. Therefore, we are precluded from analyzing this issue under the plain error doctrine. Therefore, this issue is waived

## Sentencing

Appellant argues two issues on appeal regarding his sentence: (1) the trial court's imposition of sentence for his second degree murder conviction violates the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004); and (2) the trial court erred in imposing consecutive sentences. The State argues that the enhancement factors allowable under *Blakely* were sufficient to support his sentence and that the trial court did not err in imposing consecutive sentences.

### Length of Sentence

Prior to the release of *Blakely*, in order to determine a defendant's sentence, a trial court started at the presumptive sentence, enhanced the sentence within the range for existing enhancement factors, and then reduced the sentence within the range for existing mitigating factors in accordance with Tennessee Code Annotated section 40-35-210(e).[1] No particular weight for each factor was prescribed by the statute; the weight given to each factor was left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our Code and as long as its findings are supported by the record. *See State v. Santiago*, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). In *Blakely*, the Supreme Court

[1] In response to *Blakely*, the Tennessee Legislature amended T.C.A. § 40-35-210 so that Class A felonies now have a presumptive sentence beginning at the minimum of the sentencing range. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006). This amendment became effective on June 7, 2005. The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their *ex post facto* protections. *Id.* Clearly, these amendments do not apply to Appellant's case.

determined that the "statutory maximum" sentence for *Apprendi*[2] purposes is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303, *State v. Phillip Blackburn*, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., Jackson, Jun. 10, 2008).

Thus, in Tennessee the presumptive sentence for an offense is the "statutory maximum" sentence that cannot be exceeded without the participation of a jury unless the defendant has a record of prior criminal convictions and/or an otherwise applicable enhancement factor is reflected in the jury's verdict or is admitted by the defendant. *Id*.

*Blakely* involved the sentencing scheme of the State of Washington where the criminal code establishes maximum sentences for felonies according to the class of felony. Washington also has presumptive sentencing ranges based on the seriousness of the level of the offense and the offender's criminal history. In Washington, a judge was permitted to impose a sentence above the presumptive range when there existed "'substantial and compelling reasons justifying an exceptional sentence.'" *Blakely*, 542 U.S. at 299 (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (2000)). A judge could impose an exceptional sentence utilizing one of these "reasons" illustrated in the Sentencing Reform Act only if it was not already taken into account in the calculation of the presumptive range. The Supreme Court ultimately determined that Washington's sentencing procedure violated the defendant's Sixth Amendment right to a trial by jury. *Id.* at 305. Therefore, Tennessee's similar sentencing structure was called into question.

In *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005) ("*Gomez I*"), the Tennessee Supreme Court determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury nor admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with *Blakely* because "the Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Gomez*, 163 S.W.3d at 661.

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[2] In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Ring v. Arizona*, 536 U.S. 584, 587 (2002), the Court applied *Apprendi* to hold that because Arizona conditioned eligibility for the death penalty upon the presence of an aggravating fact that was not an element of first degree murder, the Sixth Amendment guaranteed the defendant a right to a jury determination of that fact.

However, in *Cunningham v. California*, 549 U.S.270 (2007), the United States Supreme Court again addressed sentencing issues with regard to the right to a trial by jury. The decision in *Cunningham* called into question our supreme court's decision in *Gomez I*. Shortly thereafter, the United States Supreme Court vacated the judgment in *Gomez I* and remanded the case to Tennessee Supreme Court in light of *Cunningham*. *Gomez v. Tennessee*, 549 U.S. 1190 (2007).

The Tennessee Supreme Court issued an opinion on remand from the United States Supreme Court in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) ( "*Gomez II*") that affects our review of sentencing issues, specifically as to the application of enhancement factors to determine a defendant's sentence. 239 S.W.3d at 737. On initial review of the issues in *Gomez I*, which was filed on April 15, 2005, the court concluded that the defendants were limited to plain error review of their sentencing claims regarding the Sixth Amendment due to their failure to preserve the issues for plenary review. In *Gomez II*, the court adhered to its decision that the defendants had waived plenary appellate review of their sentencing claims but determined that in light of the *Cunningham* decision, a trial court's enhancement of a defendant's sentence on the basis of judicially-determined facts other than the defendant's prior convictions violates the defendant's constitutional rights under the Sixth Amendment to the United States Constitution. *Id*. at 740.

This issue was included in Appellant's amended motion for new trial that was filed September 19, 2006. Therefore, we believe he is entitled to plenary review, unlike the defendant in *Gomez I* and *Gomez II*. *See State v. Schiefelbein*, 230 S.W.3d 88, 150 n.1 (Tenn. Crim. App. 2007).

The trial court sentenced Appellant to twenty-three years for second degree murder. Second degree murder both at the time Appellant was sentenced and in the present is a Class A felony. *See* T.C.A. § 39-13-210 (1997) & T.C.A. § 39-13-210 (2006). As a Range I, standard offender, the range of sentence for a Class A felony was fifteen to twenty-five years. T.C.A. § 40-35-112(1) (1997). At the time that Appellant was sentenced, the presumptive sentence for a Class A felony was the midpoint of the range. T.C.A. § 40-35-210(c) (1997). Therefore, the trial court started at the midpoint of twenty years and increased Appellant's sentence by three years based upon three enhancement factors: (1) the defendant has a previous history of criminal convictions; (2) the victim of the offense was particularly vulnerable because of age; and (3) the defendant possessed or employed a firearm in the offense. The Tennessee Supreme Court has determined that the first enhancement factor applied by the trial court, that the defendant has a previous history of criminal convictions, is a proper enhancement factor under *Blakely*. *Gomez*, 239 S.W.3d at 730.

Appellant has several previous convictions as an adult: one conviction for public intoxication, three convictions for sale of marijuana, and one conviction for reckless driving. As a juvenile, Appellant had two charges for possession of marijuana and one charge for alcohol, one charge for driving with a revoked license, one charge of carrying a concealed weapon, and one charge for driving under the influence. This factor was properly applied in determining Appellant's sentence.

As noted earlier in this opinion, enhancement factors reflected in the jury's verdict and/or admitted by a defendant may also be used to enhance a sentence above the presumptive sentence. *State v. Phillip Blackburn*, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008). The testimony at trial was that the sole cause of Ms. Milam's death was a gunshot wound to her head. Ms. Milam's death in turn caused the death of her unborn child. Under these circumstances the jury had to believe Appellant shot Ms. Milam with a firearm. Moreover, Appellant admitted at trial that Ms. Milam was shot with a firearm, claiming however that the shooting was accidental. We believe therefore that the enhancement factor of employing a firearm is reflected in the jury's verdict, was admitted by Appellant, and was therefore properly applied to increase Appellant's sentence.

Finally, we point out that the United States Supreme Court has concluded that *Blakely* error is subject to constitutional harmless error analysis. In *Washington v. Recuenco*, 548 U.S. 212 (2006), the Court concluded that if it is clear beyond a reasonable doubt that a rational trier of fact would have found a particular sentencing factor present if presented with the question, then the application of that factor by the trial judge to increase a sentence is harmless error. 548 U.S. at 220-22.

We believe that in the instant case, it is clear beyond a reasonable doubt that any rational trier of fact if posed with the direct question of whether the Appellant employed a firearm in the commission of these murders would have found that he did. Thus, if we are incorrect in our assessment that the use of a firearm is reflected in the jury's verdict and that Appellant admitted this fact, any error is harmless.

Moreover, we also believe that consideration of the vulnerability of Ms. Milam's unborn child due to age, i.e., a viable fetus in her womb, was at most harmless error beyond a reasonable doubt. The General Assembly of Tennessee has made a viable human fetus "another" for purposes of making the killing of such a fetus subject to prosecution under

Tennessee's criminal assault and homicide statutes. *See* T.C.A. § 39-13-107.[3] In so doing, the legislature presumably meant to make the particular vulnerability of such victims to these crimes on account of age a factor to consider in sentencing to the same extent this factor is present in cases involving victims who are born alive.

The Tennessee Supreme Court has held that the particular vulnerability of a victim to a crime is an applicable enhancement factor, "if the circumstances show that the victim, because of his age or physical or mental condition, was in fact '"particularly vulnerable,"' i.e., incapable of resisting, summoning help, or testifying against the perpetrator." *State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993). It is beyond cavil that the unborn fetus in this case falls into each of these enumerated categories of vulnerability not only because of age, but also because of the physical condition of being totally at the mercy of what befell Ms. Milam. We believe any rational trier of fact, if posed with the question of whether this victim was particularly vulnerable because of age, would beyond a reasonable doubt answer this question in the affirmative.[4] For these reasons Appellant's sentence was properly enhanced to twenty-three years.

## Consecutive Sentencing

### Judicial Vindictiveness

Appellant argues that the trial court's imposition of consecutive sentences is the result of judicial vindictiveness. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Supreme Court held that it is a violation of basic due process to punish a person because he has done what the law plainly allows. 395 U.S. at 724-25. The Supreme Court stated that the Due Process Clause of the Fourteenth Amendment prevents increased sentences which are actually or likely motivated by a vindictive desire to punish a defendant for the exercise of a statutory or procedural right. *Id*. at 723-24. The *Pearce* Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness

[3]The termination of such a viable fetus during a lawful abortion remains legal. T.C.A. § 39-13-107(c).

[4]We realize that this enhancement factor, would apply to virtually every assault upon or homicide of an unborn viable fetus. Nevertheless, the legislature has not prohibited application of the factor in cases such as this one, and for us to do so would be nothing but judicial fiat.

> may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

*Id*. at 725. To prevent vindictiveness from entering into the decision and to allay any fear on the part of a defendant that an increased sentence is the product of vindictiveness, the Court fashioned a prophylactic rule that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id*. at 726. Otherwise, a presumption arises that a greater sentence has been imposed for a vindictive purpose - a presumption that must be rebutted by "'objective information . . . justifying the increased sentence.'" *Texas v. McCullough*, 475 U.S. 134, 142 (1986) (quoting *United States v. Goodwin*, 457 U.S. 368, 374 (1982)).

In *Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court limited the application of *Pearce* to circumstances in which there is a "'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." 490 U.S. at 799. "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Id.*

There is not a reasonable likelihood that the imposition of consecutive sentences at Appellant's second sentencing hearing is the product of actual vindictiveness. We base this conclusion upon the fact that Judge Robert L. Jones presided over Appellant's first sentencing and Judge Jim T. Hamilton presided over the second. The "risk of vindictiveness by [a second] trial judge being confronted by resentencing is nonexistent." *State v. John L. Goodwin, III*, No. 01C01-9601-CR-00013, 1997 WL 409484, at *7 (Tenn. Crim. App., at Nashville, Jul. 23, 1997) *perm. app. denied*, (Tenn. Nov. 9, 1998); *see also State v. Antonio Demonte Lyons*, M1999-00149-CCA-R3-CD, 2000 WL 218131, at *8 (Tenn. Crim. App., at Nashville, Feb. 25, 2000), *perm. app. denied*, (Tenn. Oct. 23, 2000). Therefore, Appellant must prove actual vindictiveness. "A trial judge is vested with discretion when fixing a sentence for an offense and when a different judge presides in a new proceeding, differing results may reasonably occur." *John L. Goodwin, III*, 1997 WL 409484, at *7. We find nothing in the record to indicate any vindictiveness on the part of Judge Hamilton.

Under Tennessee Code Annotated section 40-35-115(a), if a defendant is convicted of more than one offense, the trial court shall order the sentences to run either consecutively or concurrently. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; . . . .

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

As stated above, this section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that "the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(b)(4). However, before ordering the defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes, necessary to protect the public against further criminal conduct, and in accord with the general sentencing principles. *See Imfeld*, 70 S.W.3d at 708-09; *State v. Wilkerson*, 905 S.W.2d 933, 938-39 (Tenn. 1995).

The trial court made the following findings with regard to consecutive sentencing:

> On the subject of consecutive versus concurrent sentencing, the Court, of course, heard this case. There was a – this is something you can't – you know, a lot of these cases we have, the defendant can come in and blame what he did on intoxication with alcohol or intoxication with drugs. There is no proof of that in this case.

> The proof in this record – and I looked back at my notes just a minute ago to be sure was that you drank about three or four beers that day. No proof of that in this case.
>
> I really think you are a dangerous offender. I really do. I think that anyone that would do what you did to a woman who was seven months pregnant, whether she is your wife or not – and the proof is abundant in this case as to the way you killed this woman. Dr. Harlan's testimony was as plain as the nose on your face. You pressed that gun against her forehead and pulled the trigger.
>
> Your past record of criminal activity includes three prior felony convictions all involving drugs, for which you were placed on probation – I believe the record indicated for four years – and that you have several violations of your probation during the time that you were under that probation. You also have these misdemeanor offenses.
>
> I do think that you are a dangerous offender, and I think you had to have had little or no regard for human life to have done what you did that day in the living room of your home.

The trial court failed to make the required *Wilkerson* findings on the record before sentencing Appellant to consecutive sentences as a dangerous offender. However, we note that the trial court found that two of the factors for permissive consecutive sentencing applied to Appellant. *See* T.C.A. § 40-35-115(b)(2) & (4). The trial court needed only to find one of the statutory factors in order to impose consecutive sentences upon Appellant. T.C.A. § 40-35-115, Sentencing Comm'n Comts. Further, this Court may uphold consecutive sentencing if we are able to make the *Wilkerson* determinations from the record on appeal. *See State v. James A. Mellon*, No. E2006-00791-CCA-R3-CD, 2007 WL 1319370, at *10 (Tenn. Crim. App., at Knoxville, May 7, 2007), *perm. app. denied,* (Tenn. Sept. 24, 2007); *State v. Daronopolis R. Sweatt*, No. M1999-2522-CCA-R3-CD, 2000 WL 1649502, at *9-10 (Tenn. Crim. App., at Jackson, Nov. 3, 2000).

As stated above, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes, necessary to protect the public against further criminal conduct, and in accord with the general sentencing principles. *See Imfeld*, 70 S.W.3d at 708-09; *Wilkerson*, 905 S.W.2d 938-39. We find ample support for the *Wilkerson* factors in the record on appeal. Consecutive sentencing is necessary to protect the public. Appellant shot his pregnant wife in the forehead at point-blank range. In doing so, he killed both his wife

and his unborn child. Instead of calling 911 immediately to treat his wife and possibly save his child, Appellant chose instead to retrieve a firearm from his car, run to the woods behind his house, and throw the firearm into the woods. He states that his reason for doing so is because he was concerned that the firearm was illegal. This shows an immense lack of concern for his victim and their unborn child, as well as, a tendency to act for his own self-preservation at all costs. For these same reasons, we conclude that consecutive sentencing is reasonably related to the severity of the crimes. We believe that the murder of one's wife is a terrible offense, but the killing of one's wife when she is pregnant with your own unborn child is nothing short of horrific.

Therefore, we conclude that the trial court's imposition of consecutive sentences is proper.

## CONCLUSION

For the foregoing reasons, we affirm Appellant's convictions, the length of his sentences, and the imposition of consecutive sentences.

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JERRY L. SMITH, JUDGE